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This report only contains information on issues that have changed since the last edition. To view all Clean Air, Clean Water, Occupational Hazard and Safety, and Employment Law issues being tracked by SLMA, please visit the archives of past reports in the Members Only section of www.slma.org.

CLEAN AIR ACT*Prepared by Kilpatrick Townsend.***Plywood and
Composite Wood
Products MACT**

Recent Developments. On October 5, 2017, the Information Collection Request (“ICR”) was finalized and sent to affected, “major source,” facilities. The ICR seeks a broad range of information, including emission inventories, compliance demonstrations, process changes and information about control technologies/practices. Facilities have 120 days to submit their response.

In addition, EPA previously announced that it will be scheduling several plant tours in the coming months to gather additional information related to the potential rulemaking.

**Biogenic Carbon
Emissions**

Recent Developments. None. The recently passed federal spending bill for 2017 included a directive to the EPA, Department of Energy, and Department of Homeland Security to establish policies that reflect the carbon neutrality of biomass. This directive should accelerate EPA’s ongoing work on developing a methodology for addressing CO₂ emissions from combustion of biomass. This Biogenic Accounting Framework will have far-reaching implications in EPA’s air regulatory program.

**Boiler MACT
Rulemaking/
Litigation**

Recent Developments. In the Boiler MACT reconsideration rule litigation, oral argument had been scheduled for September 15, 2017. This case involves a challenge to EPA’s decisions to amend the major source rule by (a) setting a minimum MACT floor of 130 ppm for CO as a surrogate for organic HAP emissions and (b) establishing and clarifying work practice standards during startup and shutdown periods.

In the primary case appeal, on December 23, 2016, the DC Circuit issued an order granting EPA’s petition for rehearing of the remedy portion of the court’s July 29, 2016 decision. The court held that EPA improperly excluded the emissions data from some boilers when establishing standards for certain subcategories of major source boilers. The court initially decided to vacate (terminate) these defective standards, but EPA asked the court to change its prescribed remedy from vacatur to remand. All other petitions for rehearing were denied and the court issued the mandate in the major source and area source cases. The issuance of the mandate signifies the end of the litigation. All of the emission standards in the rule will remain in effect while EPA addresses the defective standards on remand.

**NHSM Rulemaking/
Litigation**

Recent Developments. None. The Trump Administration has placed this rulemaking on a temporary hold.

Background. On November 1, 2016, EPA published a proposed rule to categorize the following materials as non-waste fuels under certain conditions: processed creosote-borate, copper naphthenate and copper naphthenate and copper naphthenate-borate-treated railroad ties. Due to this proposed classification, the combustion of these fuels would not be considered incineration. The public comment period expired on January 3, 2017.

**Climate Change
Regulation**

Recent Developments. On October 10, 2017, EPA signed a Proposed Rule to repeal the Clean Power Plan. The Proposed Rule has not been published in the Federal Register yet. Once it is published, interested persons will have 60 days to submit comments to the agency. Previously, on April 28, 2017, the D.C. Circuit granted EPA’s request to pause litigation over the Clean Power Plan. The Court asked the parties to prepare briefs assessing whether the Court should remand the Rule to EPA for reconsideration or remain on hold indefinitely.

Background. On March 28, 2017, the President issued an Executive Order titled “Promoting Energy Independence and Economic Growth.” Among other things, this Order directs EPA to review the Clean Power Plan and the new source greenhouse gas rules for consistency with the Order and take appropriate action to suspend, revise or rescind the rules. EPA has sent a notice for publication to the Federal Register initiating the review of the Clean Power Plan.

Revised Ozone Standard

Recent Developments. None. On July 18, the House passed the Ozone Standards Implementation Act of 2017. If finalized, the Act would, among other things: extend the schedule for implementation of the 2015 Ozone Standards; change the mandatory NAAQS review period from 5 to 10 years; and authorize EPA to consider technological feasibility when revising NAAQS.

The D.C. Circuit announced that it will delay oral argument in its review of challenges to the new ozone standard indefinitely in order to allow EPA and the Trump Administration time to review the rule for possible revocation or revision.

Background. Comments on the November 17, 2016 proposed rule to implement the new 2015 ozone standard were due on February 13th. SLMA participated in the development and submittal of comments with an industry association requesting that states be provided additional flexibility and less burdens in the final rule.

CLEAN WATER ACT

Prepared by Kilpatrick Townsend.

EPA/Corps Rule to Clarify Jurisdiction of “Waters of the US”

Recent Developments. On September 27, 2017, SLMA signed on to comments prepared by the Waters Advocacy Coalition in support of the EPA and Corps’ Proposed Rule to repeal the Obama Administration’s WOTUS Rule. The Proposed Rule would re-instate the pre-WOTUS regulatory definition of regulated waters of the U.S. and would roll-back the Obama-era rule’s expanded definition of such waters. In effect, the Proposed Rule would maintain the *status quo* as the current WOTUS Rule has been stayed by the Sixth Circuit. The Proposed Rule is the first step in a two step-process. Assuming the Proposed Rule is finalized and the previous regulatory interpretation of regulated waters is re-instated, the agencies would then initiate a thorough and substantive re-evaluation of the proper definition of “waters of the U.S.” The agencies point out that such efforts would rely heavily on state input into what federal regulation, if any, is appropriate for waters within their states.

In addition, the Supreme Court heard oral arguments on October 11th for the case involving the appropriate judicial jurisdiction for challenges to the underlying WOTUS Rule.

Background. On May 27, 2015, EPA and the Corps issued the final “waters of the U.S.” (“WOTUS”) Rule. Although EPA asserts that the Final Rule provides increased certainty for regulated entities, critics disagree and expect the newly expanded definition of WOTUS to lead to increased harassment and litigation from public interest groups. It will also lead to a greater need to apply for “jurisdictional determinations” from the agencies prior to taking action that could impact a WOTUS.

In October 2015, the Sixth Circuit issued a stay of the effectiveness of the WOTUS Rule which prohibits the EPA and Corps from implementing the Rule until the current litigation regarding the legality of the Rule is completed. The decision to grant the Stay indicates that the Sixth Circuit may believe that the industry petitioners in the case have a strong like likelihood of success on the merits of the case.

On January 25, 2017, the Sixth Circuit granted an industry association’s motion to Stay the case in order to allow the U.S. Supreme Court to issue its decision regarding the proper jurisdiction and venues for the ongoing WOTUS cases.

On February 28, 2017 President Trump signed an Executive Order directing the EPA and Corps to reconsider the controversial “Waters of the United States” rule. The WOTUS Rule was finalized in 2015 and has been criticized as an attempt by EPA to extend its jurisdictional reach far beyond the traditional concept of “navigable waters.” The Rule is currently stayed, due to a prior order of the Sixth Circuit, pending ongoing litigation.

The President’s Order states that it is intended to “to ensure that the Nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles played by Congress and the States under the Constitution.” The Order directs the agencies to review the Final Rule in light of the goals listed above, and then to publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law.

The Order further directs the agencies to keep in mind Supreme Court Justice Scalia’s interpretation of the appropriate definition of WOTUS as set forth in the 2006 *Rapanos v. United States* decision. In that decision, Scalia authored a dissent from the majority opinion. In his dissent, Scalia opined that wetlands or tributaries adjacent to traditional navigable waters should only also be considered a navigable water if is “has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” This interpretation is much narrower than Justice Kennedy and the majority’s opinion that wetlands and tributaries that “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable,’ ” are subject to federal jurisdiction.

With respect to the ongoing federal court cases involving challenges to the WOTUS Rule, the Order also directs the Attorney General to, as he deems appropriate, inform the courts of such review and take such measures as he deems appropriate concerning any such case or action pending the completion of further administrative proceedings related to the rule.

It is expected that the Trump Administration will work closely with the EPA and Corps on a rewrite to the WOTUS Rule. This process will likely take several years.

Nationwide Permits for Discharge of Dredge or Fill Material

Recent Developments. None. A group of States have asked the White House to lift the temporary Stay on the final rule discussed below. The States contend that the NWP’s are needed for ongoing construction projects.

Background. On January 6, 2017, the Army Corps published a final rule for the reissuance of 50 existing nationwide permits (NWP) and two new NWP’s for the discharge of any dredge or fill materials into waters or wetlands. The Rule will take effect on March 19, 2018. Any challenges to the Rule must be filed within 120 days from January 6. The final Rule does not specifically mention the new WOTUS rule discussed above.

State Water Quality Criteria

Recent Developments. None. An industry association has filed a Petition for Reconsideration to EPA for the Washington State rule listed below.

Background. On December 19, 2016, EPA finalized stringent water quality standards for certain parts of Maine that are similar to those recently finalized for Washington. For several years, EPA has insisted that it must go beyond the national Human Health Water Quality Criteria (“HHWQC”) and adopt EPA’s unreasonably conservative and unrepresentative values, citing both environmental justice concerns and tribal trust responsibilities. SLMA is monitoring the issue and will work with its partners to get involved as needed. We also understand that EPA intends to issue a similar rule for the state of Idaho within the next 12 months.

ENDANGERED SPECIES ACT

Prepared by Kilpatrick Townsend.

Proposed Listing of Northern Long-Eared Bat (“NLEB”)

Recent Developments. Briefing is underway in the NLEB case. In late April, Plaintiffs filed a brief challenging the listing of the NLEB as threatened, as opposed to endangered. USFWS and interveners’ briefs are due to the Court in early and late July, respectively. The Court has bifurcated briefing in the case, with this first phase focused on the listing decision, and the second phase will focus on the 4(d) provisions within the rule.

Background. On January 14, 2016, the U.S. Fish and Wildlife Service (USFWS) published a Final Rule under Section 4(d) of the Act. The Final Rule authorizes certain incidental/unintentional “takes” (i.e., harm or death) including those associated with “forest management activities” in certain areas. The USFWS acknowledges that the NLEB is threatened due primarily to a disease known as “White Nose Syndrome” (WNS). As such, the Final Rule has differing restrictions depending on whether an area is within the WNS Zone or not.

The key points in the Final Rule are as follows:

- For areas outside the WNS Zone, incidental takes of NLEB resulting from tree removal or other forest management activities are not prohibited.
- For areas inside the WNS Zone, the following activities are prohibited:
 - Actions that result in incidental takings within or within the entrance to a “known hibernacula,” defined as any cave, mine or other location where bats have previously been known to hibernate during winter.
 - Tree removal activities that result in the incidental take, when the activity:
 - ◆ Occurs any time of the year and takes place within 0.25 miles of a known hibernaculum; or
 - ◆ Occurs during the pup season (June 1 - July 31) and cuts or destroys “known occupied maternity roost trees,” defined as any tree that has hosted female or juvenile bats in the past and remains suitable for re-use, or any other tree within a 150-foot radius of such roost trees.

It is important to note that tree removal activities within these designated areas are not prohibited. Rather, tree removal activities that result in, an incidental take are prohibited. Therefore, forest activities may occur in these areas provided that proper precautions are taken to avoid incidental takings. The USFWS encourages landowners to work with their state-level natural resource staff to coordinate tree removal activities.

OCCUPATIONAL HEALTH AND SAFETY ACT

Prepared by Kilpatrick Townsend.

Electric Arc

Recent Developments. The National Fire Protection Association (“NFPA”) recently released its 2018 Standard for Electrical Safety in the Workplace (“2018 NFPA 70E”). NFPA 70E addresses workplace injury and fatality hazards due to shock, electrocution, arc flash, and arc blast, and provides compliance guidance on the OSHA 1910 Subpart S (Electrical) general industry standard.

A significant change in 2018 NFPA 70E is its focus on hazard elimination as the employer's first priority in implementing risk control methods. 2018 NFPA 70E expressly adopts the Hierarchy of Risk Control Methods, which requires employers to implement preventive and protective risk control methods in the following order of priority: 1) elimination; 2) substitution; 3) engineering controls; 4) employee awareness; 5) administrative controls; and 6) personal protective equipment ("PPE"). The NFPA takes the position that elimination, substitution and engineering controls are the most effective methods of reducing electric arc risk, while awareness, administrative controls, and PPE are less effective due to their susceptibility to human error.

New additions and clarifications in 2018 NFPA 70E include:

- An employer's electrical safety program must include elements to verify that newly installed or modified electrical equipment or systems have been inspected to comply with applicable installation codes and standards prior to being placed into service.
- The employer's risk assessment procedure must address the potential for human error and its negative consequences on people, processes, the work environment and equipment.
- All lockout/tagout programs and procedures required by the standard must be audited by a qualified person at intervals not to exceed one year, and the audit must be designed to identify and correct deficiencies in the lockout/tagout programs and procedures, training, and worker execution of the lockout/tagout procedures.
- Employee training on electric hazards must be in the classroom, on-the job, or a combination of the two. The employer must maintain documentation of employee's training for the duration of his or her employment, including the content of the training, and the date(s) of which the employee received the training.
- Retraining on electrical safety must be performed at intervals no less than three years, and more frequently if an employee is not complying with safety-related practices; new technology, equipment or changes in procedure necessitate different safety-related practices from those the employee normally uses, the employee's job duties change; or the employee needs to review tasks that are performed less often than once per year or safety-related work practices not normally used by the employee during his or her regular job duties.
- While 2018 NFPA 70E retains the requirement that a job safety plan must be completed before starting any job that involves exposure to electrical hazards, the updated standard requires that the job safety plan be completed by a "qualified person," rather than simply the "employee in charge," as in prior versions of the standard. Under the new standard, "qualified person" is defined as "one who has demonstrated skills and knowledge related to the construction and operation of electrical equipment and installations and has received safety training to identify and avoid the hazards involved."

The job safety plan must contain the following information: a) a description of the job and the individual tasks; b) identification of the electrical hazards associated with each task; c) a shock risk assessment for tasks involving a shock hazard; d) an arc flash risk assessment for tasks involving an arc flash hazard; and e) the work procedures involved, special precautions, and energy source controls.

Background. OSHA's general industry standards regarding electric power generation, transmission and distribution are captured in 29 C.F.R. § 1910.269. Paragraph (1)(8) of § 1910.269 sets forth employers' responsibilities with regard to protecting employees from flames and electric arcs. Generally, Paragraph (1)(8) requires employers to: (1) assess the workplace for flame and electric-arc hazards; (2) estimate the incident heat energy from electric arcs to which employees would be exposed; (3) ensure that employees wear clothing that will not melt, or ignite and continue to burn when exposed to flames or the estimated heat energy; and (4) ensure that the employee's outer layer of clothing is flame-resistant; and (5) ensure that employees wear properly rated protective clothing and other protective equipment. Where employees are exposed to arc flashes, employers are required to "make reasonable estimates of the incident heat energy to which the employee would be exposed" (29 C.F.R. § 1910.269(1)(8)(ii)).

In addition to making the incident heat energy estimate, the employer must ensure that employees wear protective clothing and other protective equipment with an arc rating greater than or equal to the heat energy estimated.

Combustible Dust Standard

Recent Developments. None.

Background. OSHA is in the process of developing a comprehensive general industry standard to address combustible dust hazards, but the proposed standard remains in the pre-rule phase. OSHA originally issued its notice of proposed rulemaking for combustible dust in October 2009 and has been collecting information for several years. However, very little movement has been made toward a final rule. In June 2016, OSHA published a new fact sheet on “Protecting Workers from Combustible Dust Explosion Hazards.” The new fact sheet may be downloaded from the OSHA Publications webpage at: <https://www.osha.gov/pls/publications/publication.html>.

While a dedicated combustible dust standard is no longer a priority for OSHA at this time, the agency retains authority to cite employers for combustible dust hazards under the “general duty” to provide a workplace “free from recognized hazards that are causing or are likely to cause death or serious harm,” and housekeeping obligations set out in other OSHA standards, such as the recent Final Rule on walking-working surfaces and fall protection systems. Employers should also look to guidance from industry consensus standards, such as the 2017 edition of the NFPA Standard for the Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities (“NFPA 664”) and the 2016 edition of the NFPA General Standard on the Fundamentals of Combustible Dust (“NFPA 652”).

Companies considering material modifications or system upgrades in the next three years should confirm that they meet the specifications in NFPA 652 and 664. Under the current draft of the 2019 NFPA standard on combustible dust, all facilities with combustible dust hazards must complete a Dust Hazard Analysis (“DHA”) by September 7, 2020. A DHA is a systematic review to identify and evaluate potential fire, flash fire, or explosion hazards associated with the presence of combustible dust in a process or facility and provide recommendations to manage the hazards (similar to OSHA’s Process Hazard Analysis for hazardous chemicals). Once a hazard analysis is completed, OSHA generally expects facilities to implement the recommendations as soon as possible, but in any event, no later than one to two years after the hazard analysis is completed. Thus, at the conclusion of the DHA, if systems or equipment are found non-compliant with NFPA specifications, they will need to be upgraded.

Workplace Injuries and Illnesses Recordkeeping

Recent Developments. OSHA is soliciting public comments regarding extending the recordkeeping requirements in 29 CFR Part 1904, which require employers to complete the OSHA 300, 300-A, and 301 forms for recordable injuries and illnesses. The recordkeeping requirements are set to expire on January 31, 2018 unless OSHA applies for an extension of approval from the Office of Management and Budget. To submit comments, go to <http://www.regulations.gov> (Docket No. OSHA-2010-0055). Comments must be submitted by **November 13, 2017**.

Background. Under OSHA’s recordkeeping regulations (29 C.F.R. § 1904), covered employers must prepare an OSHA 301 Incident Report or equivalent form for certain work-related injuries and illnesses. Employers must also document each recordable injury or illness on an OSHA 300 Log. A separate OSHA 300 Log must be completed for each of your establishments. At the end of each calendar year, these employers must review their OSHA 300 Logs to ensure that they are complete and accurate and must correct any deficiencies. At the end of each calendar year, all employers, except those who are exempt from OSHA’s recordkeeping requirements, must also create an annual summary of the injuries and illnesses using the OSHA Form 300A or equivalent form. Employers are required to retain these records for five years following the end of the calendar year that these records cover. Recordkeeping citations are low-hanging fruit for OSHA.

The Occupational Safety and Health Act states that “[n]o citation may be issued . . . after the expiration of six months following the occurrence of any violation.” 29 U.S.C. § 658(c). On December 19, 2016, OSHA issued a final rule to clarify employers’ ongoing duty to make and maintain an accurate record of each recordable injury and illness.

Under the final rule, if an employer failed to prepare an OSHA 301 Incident Report and update the OSHA 300 Log within the seven-day recording period, the employer would remain on the hook to make the required records during the entire five-year record retention period, and non-compliant employers could receive an OSHA citation up to five years after a recordable injury or illness occurred.

The final rule became effective on January 18, 2017. On March 1, 2017, Congress approved a resolution to overturn the final rule and to restore the long-standing six-month citation period. The resolution was approved by the Senate and signed by President Trump on April 3, 2017. On May 3, 2017, OSHA officially withdrew the final rule from the Code of Federal Regulations. OSHA now cannot issue a recordkeeping citation to an employer for failure to record a workplace injury or illness more than six months after the recordable injury or illness occurred.

Workplace Injuries and Illnesses Reporting

Recent Developments. None.

Background. As of January 1, 2015, all employers must report work-related fatalities to OSHA within eight hours of the incident resulting in the fatality and must report to OSHA all work-related in-patient hospitalizations that require care or treatment, all amputations, and all losses of an eye within twenty-four hours of the incident.

On May 11, 2016, OSHA issued the final rule requiring employers to electronically submit injury and illness data on an annual basis. The final rule requires establishments with 250 or more employees to annually submit the OSHA 300 Log, OSHA Form 300A, and OSHA Form 301 incident reports, while establishments with 20 to 249 employees in certain industries (such as manufacturing) are only required to submit the OSHA Form 300A. The final rule required all covered establishments to submit the preceding year’s OSHA Form 300A to OSHA by July 1, 2017, but OSHA has since proposed extending the deadline to December 1, 2017. Establishments with 250 or more employees will submit the preceding year’s OSHA Form 300A and OSHA Form 301 incident reports, along with the OSHA 300 Log, to OSHA starting on July 1, 2018 and on an annual basis thereafter.

OSHA intends to publish data from the submissions (without employee names and other personal identifiable information) on a publicly accessible website.

The electronic reporting rule also expressly prohibits employers from retaliating against employees for reporting work-related injuries or illnesses. To that end, the rule requires employers to inform employees of their right to report work-related injuries or illnesses without retaliation. This notice requirement may be satisfied by posting the *OSHA Job Safety and Health – It’s The Law* worker rights poster from April 2015 or later. In addition, the employer must ensure that its procedure for reporting work-related injuries and illnesses is reasonable and does not deter or discourage employees from reporting.

On August 1, 2017, OSHA launched its Injury Tracking Application (ITA), the web-based form through which covered employers will submit injury and illness data from their 2016 OSHA Form 300A, at <https://www.osha.gov/injuryreporting>. The data submission process consists of four steps: 1) creating an establishment account; 2) adding 300A summary data; 3) submitting data to OSHA; and 4) reviewing the confirmation email from OSHA. OSHA estimates that the entire submission process will take approximately twenty minutes. OSHA recently proposed to extend the initial submission deadline to December 1, 2017. We recommend a wait-and-see approach as it appears highly likely that electronic reporting will not be required until December 1, 2017, if ever.

In the Spring 2017 Unified Agenda of Federal Regulatory and Deregulatory Actions, OSHA reiterated its intention to re-evaluate the electronic reporting rule. The electronic reporting requirements are currently under review by the new administration, and a request for information relating to its anti-retaliation provisions is anticipated.

Walking– Working Surfaces and Fall Protection Standards

Recent Developments. None.

Background. OSHA adopted general industry standards on Walking-Working Surfaces (29 C.F.R. part 1910 subpart D) and Personal Protective Equipment (29 C.F.R. part 1910, subpart I) in 1971. OSHA issued proposed rules to update the Walking-Working Surfaces and PPE standards in 1973 and 1990. OSHA reopened the record in 2003 and in 2010, published a new proposed rule. The last series of hearings and public comment periods on the most recent iteration of the proposed rule ended in 2011.

On January 18, 2017, OSHA's final rule updating general industry walking-working surfaces and fall protection standards went into effect. The updated requirements apply to the use and maintenance of fall protection systems, fixed and portable ladders, stepstools, mobile ladder stands, mobile ladder stand platforms, and stairways. Employers may choose from several fall protection options, such as guardrail systems, safety net systems, personal fall arrest systems, positioning systems, travel restraint systems, and ladder safety systems. The final rule also requires employers to equip all fixed ladders that extend more than 24 feet with some form of fall protection. By **November 19, 2018**, existing fixed ladders that currently do not have any fall protection must have a cage, well, ladder safety system, or personal fall arrest system, and new ladders and replacement ladder sections must have either a ladder safety system or personal fall protection system. By **November 18, 2036**, *all* fixed ladders that extend more than 24 feet must have a ladder safety or personal fall arrest system. The final rule also required employers to train (and retrain as necessary) employees who are exposed to fall hazards on fall prevention and the proper use of fall protection equipment by **May 17, 2017**.

Voluntary Protection Program

Recent Developments. OSHA is soliciting public comments regarding the information collection requirements for participants in VPP Programs. VPP participants must provide, among other information, injury and illness rate performance information (e.g. number of employees, Recordable Injury and Illness Case Incidence Rate information), safety and health management program information (worksites analysis, hazard prevention and control, and safety and health training), and annual participant self-evaluations. OSHA is particularly interested in whether these information collection requirements are necessary for the proper performance of the Agency's functions, the quality, utility, and clarity of the information collected, and ways to minimize the burden on employers who must comply, such as through automated collection or transmission. To submit comments, go to <http://www.regulations.gov> (Docket No. OSHA-2011-0056). Comments must be submitted by **October 30, 2017**.

Background. First introduced in 1982, OSHA Voluntary Protection Programs promote voluntary compliance and recognition of employers who have implemented effective health and safety management systems and maintained injury and illness rates below the national averages for their industries. To participate, employers submit an application to OSHA and undergo an onsite evaluation. VPP participants are exempt from OSHA programmed inspections while they maintain their VPP status. OSHA represents that its On-Site Consultation Program is separate from enforcement, and therefore, employer participation does not result in penalties or citations. Approximately 37 employers in the Wood Product Manufacturing industry currently participate in VPP.

OSHA Request for Information on Powered Industrial Truck Standards

OSHA is soliciting public comments regarding the information collection requirements in the Powered Industrial Trucks Standard. The current information collection requirements are as follows:

- Before modifying a truck in a manner that affects its capacity and safe operation, an employer must obtain the manufacturer's approval. If the manufacturer grants such approval, the employer must revise capacity, operation, and maintenance instruction plates, tags and decals accordingly. For front end attachments not installed by the manufacturer, employers must place a marker on the trucks that identifies the attachment and the weight of both the truck and attachment when the attachment is at maximum elevation with a laterally centered load.
- Employers must evaluate each operator's performance at least once every three years and certify that each operator meets the Standard's training and evaluation requirements. The certification must contain the operator's name, training date, evaluation date, and the identity of the individual(s) who performed the training and evaluation.

OSHA is particularly interested in whether these information collection requirements are necessary for the proper performance of the Agency's functions, the quality, utility, and clarity of the information collected, and ways to minimize the burden on employers who must comply, such as through automated collection or transmission. To submit comments, go to <http://www.regulations.gov> (Docket No. OSHA-2011-0062). Comments must be submitted by **November 27, 2017**.

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

Ice Head Promises to Multiply Worksite Enforcement Actions

October 1, 2018.

Recent Developments. In a speech given on October 17, acting Immigration and Customs Enforcement ("ICE") Director Tom Homan stated that he has instructed Homeland Security Investigations, the investigative unit of ICE, to quadruple worksite enforcement actions next year, referring to the next fiscal year beginning

Trump Moves to Administratively Change the ACA

Recent Developments. While Congress could not legislatively repeal or even modify the Affordable Care Act ("ACA"), President Trump is moving to make significant changes in it administratively through the executive power.

Background. The Executive Order issued on October 12, 2017 instructs federal agencies to lay the groundwork for allowing less-expensive insurance plans with fewer benefits under certain circumstances, and to foster competition in the individual insurance markets. While the previous administration had allowed certain short-term insurance to provide limited coverage, the limits will be lifted under the programs envisioned by the Executive Order and will seek to expand ways in which workers can use employer-funded accounts to buy their own policies. Plans may also be developed to let small businesses and possibly individuals band together to buy insurance that is cheaper but less extensive. The new health plan concepts would not be subject to as many restrictions. Other possible executive action changes have been announced that would include the discontinuance or reduction in certain health care subsidies that were not a part of the ACA, but that the Obama Administration nevertheless funded without Congressional approval. A federal district court judge had ruled that the subsidies were illegal but did not enjoin them. At the same time, the Trump Administration is considering certain legislative proposals that would preserve the payments to insurers while allowing for an Administration proposal to give states more flexibility in implementing the ACA.

As this newsletter is going to press, reports indicate that a bipartisan group of senators are close to an agreement to preserve for two years the insurance subsidy payments made to help offset consumers' out-of-pocket costs, while allowing flexible new provisions enabling more people to buy less comprehensive plans with higher deductibles but lower premiums, and also making it easier for states to get waivers from the ACA requirements.

**Medical Pot, Synthetic
Drugs, Raise New Drug
-Testing Issues for
Employers**

Recent Developments. With the growth in the use of medical marijuana and the continuing expansion of synthetic drugs, traditional employer drug-testing policies may need review. Let's take the pot issue first.

Background. Medical marijuana is now legal in 29 states, but federal law still considers marijuana a Class One drug under Schedule I of the Controlled Substances Act, along with other drugs on this list like heroine and LSD.

How does an employer reconcile its drug-testing policies with these potentially inconsistent government policies? Further, what about the Americans' with Disabilities Act ("ADA"), which requires an employer to accommodate an employee with a disability. And what about the employee at work who is using medical marijuana, should he or she report the use and ask for an accommodation, or in doing so, is the employee risking termination? And what about the situation with union contracts, which require "just cause" for termination?

Further complicating the issue is the fact that very few court cases address and resolve these issues. Nevertheless, let's review the status of the pending cases and what guidance they provide for answers to the above questions. In the court cases or decisions that have addressed these issues, results are generally supportive of employers. Employers are generally allowed to prohibit marijuana use and impairment in the workplace. Further, if a significant portion of the employer's business comes from federal contracts, the employers are subject to the Drug-Free Workplace Act of 1988, which requires such employers to prohibit employees from engaging in the unlawful possession or use of any controlled substance. Because marijuana is a "controlled substance" under federal law, federal contractors must comply with the federal law if they wish to continue to accept federal government contracts. Regarding the potential applicability of the ADA, no court has held that the ADA requires an employer to accommodate an employee who uses a drug like marijuana that is illegal under federal law. Similarly, labor arbitrators allow employers to discipline or discharge workers who test positive for marijuana, on the same basis that an employer should be allowed to prohibit a drug that is illegal under federal law.

In an important ruling in July of this year, the Massachusetts Supreme Judicial Court addressed an employee who was fired after telling her employer about her legal marijuana use to treat Crohn's Disease. The court ruled that the plaintiff raised a potential disability discrimination claim under state law, rejecting the employer's motion to dismiss the claim. The ruling is not considered a final one, however, but it tends to encourage potential plaintiffs who have experienced adverse employment actions because of their use of medical marijuana under the state laws of certain states. A few states, like Nevada, specifically require employers to accommodate medical marijuana users.

The legal issues are particularly controversial when there is no evidence that the prohibited marijuana use has created an impairment. Showing impairment from marijuana is very difficult if not impossible, since marijuana can be detected in an individual's system as many as 30 days after usage, and there is currently no reliable test to determine if an individual is impaired by THC, the active chemical in marijuana.

In spite of these uncertainties, most of the case law supports the right of employers to discipline or terminate employees who test positive for marijuana.

This conclusion also suggests that employees who disclose their use of medicinal marijuana to their employer are not immune from discipline if they subsequently are chosen for a drug test.

Some employers are reassessing their drug-testing for marijuana. Some medical tests have shown that marijuana is not as debilitating in terms of affecting skills such as driving an automobile, and most believe marijuana is not as dangerous as many other drugs. Further, marijuana remains in the system for such a long period of time and there is no consensus on the level of THC to warrant a positive drug test, so some employers are giving consideration to deleting marijuana from the list of drugs for which drug-testing is conducted. The scarcity of job applicants adds to this concern.

Another factor is the expanding use of so-called synthetic marijuana, popularly known in some circles as "spice." Synthetic marijuana is not prohibited by law in many areas, and reportedly only a few laboratories can even test for it and that at great expense. The entire area of synthetic drugs has created enormous practical as well as legal issues for employers, and indeed for everyone. That is, the challenges that employers and law enforcement officials face include detecting use of many impairing synthetic drugs that are not included under most drug-testing programs and, indeed, not even declared illegal.

Reports suggest that foreign manufacturers, particularly in Mexico and China, try to modify synthetic drugs so that the substances no longer test as illegal and also allegedly to make them even more addictive, and thus increase sales. These synthetic drugs are often much stronger than the regular illegal drugs and often cause more adverse side effects. There are no easy solutions to these problems.

Plaintiff's Class Action Lawyers Go Too Far in Soliciting Clients

Recent Developments. Employers often complain about so-called "ambulance chasing" plaintiffs' lawyers.

Background. In a recent ruling, a federal judge in Pennsylvania chastised a plaintiffs' law firm about its solicitation efforts and set forth guidelines about accuracy and honesty in efforts to recruit clients to join in a class action as plaintiffs. *Katz v. DNC Servs. Corp.*, No. 2:16-cv-05800 (E.D. Pa.) (motion to strike consent forms granted 9/28/17). The case was a wage-hour claim brought by a group of former Democratic Party organizers suing the Pennsylvania Democratic Party for overtime pay. One of the statements struck down by the judge as objectionable said: "If you do not join, you will not be entitled to and will not be able to receive any money in this lawsuit as a result of any federal wage violations committed by the DNC or the state Democratic parties." The judge found the sentence did not make it clear that someone who doesn't join the action could still have separate counsel and file a separate lawsuit. The case also illustrates how a judge can supervise notification of the information provided to class or collective action members. The judge said he required a provision to avoid "unbalanced and misleading statements" to people who may be solicited to join the case.

EEOC Required to Pay Employer Almost \$2M in Legal Fees

Recent Developments. In September, a federal judge ruled that the Equal Employment Opportunity Commission ("EEOC") must pay an employer almost \$2 million in legal fees for pursuing class sexual harassment claims against a company that it knew or should have known were frivolous. *EEOC v. SRST Van Expedited, Inc.*, No. 07-CV-95 (N.D. Iowa, 9/22/17).

Background. The EEOC had claimed that the company had engaged in the pattern or practice of discrimination against female truck drivers and trainees who were sexually harassed. The judge making the award rejected the EEOC's argument that claims against the employer did not have the sufficient "preclusive" effect on potential future legal action by the agency against the company for it to be deemed the prevailing party under Title VII. However, the judge did reduce a previous award from approximately \$4.5 million because not all of the EEOC claims were deemed frivolous.

OSHA Releases Top 10 List of Safety Violations

Recent Developments. OSHA released its list in September of the 10 most commonly cited safety violations.

Background. The preliminary Top 10 most-cited violations for 2017 are as follows: (1) fall protection at 6,072 violations (29 C.F.R. 1926.501); (2) hazard communication at 4,176 violations (29 C.F.R. 1910.1200); (3) scaffolding at 3,288 violations (29 C.F.R. 1926.451); (4) respiratory protection at 3,097 violations (29 C.F.R. 1910.134); (5) lockout/tagout at 2,877 violations (29 C.F.R. 1910.147); (6) ladders at 2,241 violations (29 C.F.R. 1926.1053); (7) powered industrial trucks at 2,162 violations (29 C.F.R. 1910.178); (8) machine guarding at 1,933 violations (29 C.F.R. 1910.212); (9) fall protection training at 1,532 violations (29 C.F.R. 503); and (10) electrical wiring methods at 1,405 violations (29 C.F.R. 1910.305).

Nissan Workers in Mississippi Vote No Union

Recent Developments. In a long-standing saga, Southern auto workers have again rejected the United Auto Workers Union, this time after a 12-year campaign to organize the Nissan plant in Canton, Mississippi. The vote was 2,244 to 1,307 against the union on August 3-4. The union supporters thought they had certain demographics in their favor, since 80% of the Nissan workforce is African-American, and data shows that African-American workers are more likely to vote for a union than others. Further, the union hoped to capitalize on certain second-tier status given certain workers progressing from temp status to regular status. The union had attempted to convince Nissan to remain neutral, as Volkswagen has agreed to in an election several years ago in Chattanooga (which the UAW also lost).

Background. The union used as a campaign slogan "workers' rights are civil rights" and brought in well-known speakers such as Senator Bernie Sanders and actor Danny Glover. The union also through certain preachers and civil rights leaders challenged Nissan for a meeting for a "fair and free" election, but the company did not respond. The company not only ran a strong anti-union campaign, but had a lot of support from the business committee and Mississippi political leaders. The Chamber of Commerce took out certain local media ads, and the governor issued an anti-union message. The company played anti-union videos in the plant and supervisors enlisted support for the company.

A union committee person said that the union filed for the election with less than half of the workers having signed union cards, which is fairly unusual for a union, apparently because the campaign had been going on for so long. The union had difficulty soliciting support in the plant because reportedly its in-plant organizing committee was not as large or effective as normal.

Further, the union had difficulty figuring out who were eligible voters as temp agencies reportedly account for as much as 40% of the 6,400 workers. In-plant organizing committee members try to have one-on-one conversations with as many eligible voters as possible urging their support for the union.

After the election, the UAW president, apparently looking for a scapegoat, blamed the loss on a scandal that broke before the election where a union vice president was charged with taking bribes from Chrysler. Reports from the Nissan plant, however, suggest that the indictment was not a major campaign issue, and that many workers voted against the union in a fear of "rocking the boat" and risk losing their high-paying jobs that exceeded most every other similar job in their community.

Union supporters claim that rumors circulated that Nissan's favorable program of leasing cars to employees having little credit at below-market rates would end under a union contract. One worker described a "three-bag" demonstration at an anti-union company meeting. One bag said "Nissan," another said "Employee," and another said "Union." Nissan speakers explained that Nissan comes to the table with everything in their bag, and the employees come and get some from the Nissan bag. But the union comes in empty-handed and has to fill up its bag from the employee bag.

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